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8                   UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE  
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10                   UNITED STATES OF AMERICA,

11                   Plaintiff,

12                   v.

13                   C. MARVIN WILBUR,

14                   Defendant.

CASE NO. CR09-191-MJP

ORDER DENYING DEFENDANT'S  
MOTION FOR RELEASE PENDING  
APPEAL

15  
16         This matter comes before the Court on Defendant Marvin Wilbur's motion for release  
17 pending his appeal due to his medical condition. (Dkt. No. 237.) Having reviewed the motion,  
18 the government's response (Dkt. No. 242), Defendant's reply (Dkt. No. 246), the government's  
19 surreply (Dkt. No. 248), and all related papers, the Court DENIES the motion.

20                   **Background**

21         Wilbur pled guilty to conspiracy to traffic in contraband cigarettes and conspiracy to  
22 launder money in February 2010. (Dkt. No. 128 at 2.) Pending before the Ninth Circuit is his  
23 second appeal. Arguing the Bureau of Prisons is unable to provide sufficient monitoring and

1 care to address his medical condition, he moves for release pending that appeal. (Dkt. No. 246 at  
 2 2.)

3 The parties do no dispute the facts pertinent to this motion. Wilbur's 2010 guilty plea  
 4 preserved his right to appeal certain pretrial orders. (Dkt. No. 128 at 12.) In March of 2012, the  
 5 Ninth Circuit issued a 27-page opinion affirming, in part, and reversing, in part, Defendant's  
 6 convictions. United States v. Wilbur, 674 F.3d 1160, 1182 (9th Cir. 2012). The case was  
 7 remanded back to this Court for re-sentencing. (Id.) Before remand, Wilbur sought additional  
 8 appellate review of certain due process arguments, filing a Petition for Rehearing with  
 9 Suggestion of Rehearing En Banc for the Ninth Circuit. (Ninth Circuit Dkt. No. 58-1.) By order  
 10 dated June 15, 2012, the panel denied Defendant's petition. (Ninth Circuit Dkt. No. 59.)

11 On remand, Wilbur filed a motion to vacate or in the alternative for leave to withdraw  
 12 conditional guilty plea. (Dkt. No. 207.) This Court denied the motion, finding the Ninth Circuit  
 13 had already considered and rejected the merits of Defendant's due process arguments, which  
 14 were the basis of the motion to withdraw or vacate the plea. (Dkt. No. 207 at 1.) This Court  
 15 then sentenced Wilbur to 12 months and one day of incarceration and restitution. (Dkt. No.  
 16 218.)

17 Wilbur reported to the Bureau of Prison's Federal Detention Center at SeaTac ("FDC").  
 18 Shortly after reporting to FDC, Defendant experienced medical problems that required  
 19 hospitalization from January 17, 2013 to March 12, 2013. (Dkt. No. 238.) After Wilbur was  
 20 discharged from a local hospital, the Bureau of Prisons designated Defendant as an inmate with  
 21 special medical conditions (a level 3). Wilbur will soon be transferred to an institution that can  
 22 meet his medical needs. (Dkt. No. 215.)

23 **Analysis**

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1       A Court may order the release of a defendant pending appeal if that person was “found  
 2 guilty of an offense and sentenced to a term of imprisonment” and if the Court finds:

- 3             (A) by clear and convincing evidence that the person is not likely to flee or pose a  
 4 danger to the safety of any other person or the community if released under  
 5 section 3142 (b) or (c) of this title; and  
 6             (B) that the appeal is not for the purpose of delay and raises a substantial question  
 7 of law or fact likely to result in—  
 8                 (i) reversal,  
 9                 (ii) an order for a new trial,  
 10                 (iii) a sentence that does not include a term of imprisonment, or  
 11                 (iv) a reduced sentence to a term of imprisonment less than the total of the time  
 12 already served plus the expected duration of the appeal process.

13       18 U.S.C. § 3143(b). An appeal raises a substantial issue of law or fact if the issue is one that is  
 14 fairly debatable or fairly doubtful. United States v. Handy, 761 F.2d 1279, 1283 (9th Cir. 1985.)  
 15 The Defendant bears the burden of proof. United States v. Montoya, 908 F.2d 450, 451 (9th Cir.  
 16 1990).

17       Turning to the first requirement, the Court finds clear and convincing evidence Wilbur is  
 18 not a flight risk or a danger to the community: the record showshe is 75 years old man who is in  
 19 poor health and who needs near constant medical care and monitoring. (Dkt. Nos. 238, 239,  
 20 247.) Given these circumstances, combined with his lack of resources, the Court finds Wilbur is  
 21 unlikely to flee if released.

22       On the second requirement, Defendant contends his appeal raises a significant issue of  
 23 law because on remand, this Court should have applied the “fair and just” standard for  
 24 withdrawal of a guilty plea, rather than the more stringent “manifest injustice” standard. (Dkt.  
 25 No 191 at 3.) The Court disagrees and finds the issue is not one that is fairly debatable or  
 26 doubtful because Defendant’s position is based on a mischaracterization of the law in this  
 27 Circuit. Wilbur argues the case relied on by this Court, United States v. Nagra, 147 F.3d 875  
 28 (9th Cir. 1998) for the manifest unjust standard is no long good law because it cited a case that

1 was over-ruled by United States v. Ruiz, 257 F.3d 1030 (9th Cir. 2001). He claims the Court  
 2 should have applied Ruiz. (Dkt. No. 191 at 4.)

3 Wilbur's contention does not raise a substantial issue of law for his appeal. First, Nagra  
 4 remains the law in this Circuit and has been favorably cited for the manifest injustice standard  
 5 since Ruiz. See e.g. United States v. James, 98 Fed.Appx. 648, 650 (9<sup>th</sup> Cir. 2004.) Second,  
 6 Nagra addressed the exact situation issue here: a motion to withdraw a guilty plea on remand  
 7 when "reversal did not undermine the validity of the conviction." Nagra, 147 F.3d at 880. The  
 8 Nagra Court explained, "there can be no manifest injustice in refusing to permit a defendant to  
 9 withdraw a guilty plea when there is no serious contention that the defendant is innocent of the  
 10 crimes charged." Id. Like Nagra, here, there is no serious debate Wilbur is guilty of the crimes  
 11 charged when the Ninth Circuit has upheld the validity of his conviction and rejected his due  
 12 process arguments that now underpin his motion to withdraw his guilty plea. The law in this  
 13 Circuit remains the more stringent manifest injustice standard when a defendant seeks to  
 14 withdraw a guilty plea on remand. Third, Wilbur wrongly identifies Ruiz as applying to the facts  
 15 of this case. In Ruiz, the defendant sought to withdraw his guilty plea before sentencing when he  
 16 learned of possibly exculpatory evidence. Id. at 1033. In contrast, here Wilbur sought to  
 17 withdraw his guilty plea after he had already been sentenced once, had appealed, the Ninth  
 18 Circuit, which ultimately upheld the basis for his conviction, and the case was simply remanded  
 19 for re-sentencing. The lower standard articulated in Ruiz, does not apply here.

20 Even assuming *arguendo* the Court did apply the wrong legal standard, Wilbur fails to  
 21 show appellate review of this error would likely result in reversal of his conviction, an order for a  
 22 new trial, a sentence that does not include a term of imprisonment, or a reduced sentence that is  
 23  
 24

1 less than the total appeal process. He makes no argument on this prerequisite for release under  
2 18 U.S.C. § 3143(b).

3 Finally, the Court finds no basis to release Defendant when the Bureau of Prisons has  
4 provided and will continue to provide necessary medical care. The record shows the Bureau of  
5 Prisons responded to Defendant's medical needs by hospitalizing him, at considerable expense  
6 when the FDC-SeaTac was unable to provide the necessary care. (Dkt. No. 251) And, because  
7 the Bureau of Prisons is aware of Defendant's medical needs, it is in the best position to decide  
8 now on his placement at an appropriate facility. (*Id.*) Finally, the Bureau of Prisons is in the  
9 process of transferring Defendant to an institution that can provide the requisite level of medical  
10 care.

11 **Conclusion**

12 Because Wilbur failed to show his appeal raises a substantial issue of law, which if  
13 determined favorably to him will likely result in a reversal, a new trial, a sentence that does not  
14 include a term of imprisonment or a reduced sentence, this Court DENIES his motion for release  
15 pending appeal.

16 The clerk is ordered to provide copies of this order to all counsel.

17 Dated this 22nd day of March, 2013.

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20 Marsha J. Pechman  
21 Chief United States District Judge  
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